

## **THE BINDING EFFECT OF THE CONSTITUTIVE DOCUMENTS OF COMPANIES: THE 1973 AND 2008 COMPANIES ACTS OF SOUTH AFRICA**

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### **SUMMARY**

This contribution examines the provisions of the constitutive documents of companies under two specific provisions, namely s 65(2) of the Companies Act 61 of 1973 and s 15(6) of the Companies Act 71 of 2008. The aim is to determine who is bound by these provisions, the circumstances which give rise to being bound by them, and the possible effect thereof on various parties.

The provisions of the constitutive documents under section 65(2) of the 1973 Companies Act are interpreted by courts and academic writers to amount to a statutory contract between a company and its members and between members inter se. The members are said to be bound by the provisions of these documents only in their capacity as members. It is submitted, however, that the rights and obligations are granted to members in their capacity as such if they are membership rights which are granted by virtue of one's membership.

So far the courts have failed to provide a logical explanation of the concept "capacity of a member as such". This failure and the "qua membership test" resulted in limitations in the interpretation of section 65(2): for example, the exclusion of persons who are regarded as outsiders. The directors, despite the fact that numerous provisions of the applicable article provides for their rights, have rights that are unenforceable via the articles, for being regarded as outsiders. The company on the other hand can enforce the obligations against

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the directors on the basis of breach of their fiduciary duties. These limitations called for a redraft of section 65(2).

This contribution raises the legal challenges raised by the above. It arrives inter alia at the conclusion that the “qua membership test” may find application under the 2008 Companies Act, since members/shareholders may be allowed to exercise rights that are membership rights granted to them by virtue of their membership, and directors may be allowed to exercise rights that are granted to them in their official capacities as such.

**Keywords:** Constitutive documents; Memorandum of Incorporation; Notice of Incorporation; binding effect of constitutive documents; legal nature of constitutive documents